BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DALE A. THORTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 176,147
DON'S FINISH CARPENTER SERVICE	)	
Respondent	)	
AND	)	
	)	
UNION INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund requested review of an Award entered by Special Administrative Law Judge William F. Morrisey dated November 15, 1994.

APPEARANCES

The claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, James B. Biggs of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, D. Steven Marsh of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board reviewed the record and adopted the stipulations listed in the Award.

ISSUES

The Workers Compensation Fund (Fund) appealed the decision of the Special Administrative Law Judge assessing 100 percent of the liability for the award against the Fund. The sole issue raised by this appeal is the Fund's liability. The findings and conclusions of the Special Administrative Law Judge concerning matters not raised by the parties in this appeal are hereby approved and adopted by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

The Award of the Special Administrative Law Judge that assessed all of the liability for the claim against the Fund should be reversed.

Under certain circumstances, an employer can be relieved of liability for a work-related injury to its employee. K.S.A. 1991 Supp. 44-567 reads in relevant part:

> "(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:
>
> "(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.
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> "(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund.
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> "(b) In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the

handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment. If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes the existence of a reservation in the mind of the employer when deciding whether to hire or retain the employee.

"(c) Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation."

K.S.A. 44-566(b) defines a "handicapped employee" as follows:

"(b) 'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

. . .

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

> "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

The Fund correctly states that its liability is premised upon the employer's knowingly hiring or retaining a worker who is handicapped as defined in K.S.A. 44-566(b). The question is how specific must an employer's knowledge be to meet the requirements of K.S.A. 1991 Supp. 44-567. The question of whether an employer has sufficient knowledge of an employee's preexisting impairment to qualify under K.S.A. 1991 Supp. 44-567 is a question of fact.

In Denton v. Sunflower Electric Coop, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), Aff'd 242 Kan. 430, 748 P.2d 420 (1988), the court was presented with this issue of whether the evidence was sufficient to establish that respondent retained claimant after having acquired knowledge of a preexisting impairment of such character that he was a handicapped employee within the meaning of the statute. The court noted the statutory requirement that only where it is proven that an employee was hired or retained by the employer with knowledge of a handicap will liability for compensation be shifted from the employer to the Fund. It is the employer's burden to prove that claimant was hired or retained after the employer acquired knowledge or knew of an impairment causing the employee to be handicapped.

In Denton, the Court determined that claimant's preexisting disk disease put him at a disadvantage in obtaining employment or reemployment. It was not necessary that the employer have a "mental reservation" when hiring or retaining the handicapped employee. To relieve the employer of liability, it was sufficient that it show that the employee was handicapped and that the employer knew of the impairment. See also Ramirez v. Rockwell International, 10 Kan. App. 2d 403, 701 P.2d 336 (1985).

The Fund asserts that while respondent knew claimant had episodes of back soreness, there was no evidence that respondent knew claimant was impaired or handicapped. The Fund argues that knowledge of an injury does not necessarily rise to the level of knowledge of a handicap.

The determination of whether an employer's knowledge was sufficient to constitute a knowledge of a handicap is made on a case-by-case basis. It is not necessary that the employer's knowledge be of a particular and medically specific injury "the requisite knowledge is knowledge of handicap causing functional limitation," Denton, 12 Kan. App. 2d 268. Under the facts of this case, the Appeals Board finds the employer's knowledge did not rise to the requisite level.

The claimant, at the time of regular hearing, was a 62-year-old man who had worked most of his life as a carpenter. He was injured on February 20, 1992, when he slipped on an air hose and fell on his back, shoulders and neck. At the time claimant was hired by respondent, claimant related that he had had "a little back problem off and on". He did not tell respondent that he had received any medical treatment for his back. Furthermore, he denied

any present complaints. At the regular hearing, claimant characterized his condition prior to the accident which is the subject of this claim as "a little problem with my back which mostly all carpenters do have".

Claimant's medical history includes a previous work-related slip-and-fall injury which occurred while working for a different employer on July 6, 1990. He received medical treatment for that injury and was thereafter released to return to the same job without any restrictions or accommodations. He experienced an injury in April 1991, where he twisted his hip. Again, he was released to return to his same job with no restrictions following medical treatment. When working for respondent prior to his injury, claimant testified that the extent of his conversations with his employer about his prior back problems was that he would occasionally mention that he was having a backache, but he would continue working without interruption. Claimant did not ask for nor was he given any accommodation by respondent. He performed the regular duties of a finish carpenter. Respondent did not file a Form 88, Notice of Handicapped Employee, with the Division of Workers Compensation.

The respondent has not carried its burden of proof in this case. Although claimant had two prior work-related injuries, the record does not establish that he was handicapped thereby or that respondent had knowledge of a handicap.

The Kansas Court of Appeals stated in Hines v. Taco Tico, 9 Kan. App. 2d 633, 635 (1984):

> "While some Kansas cases have held that knowledge of a general back problem is the equivalent of knowledge of a handicap, a single back injury does not necessarily affect one's work ability or employment possibilities and cannot be assumed to have recurring effects. . . . In those cases where knowledge of a back problem has been found to be knowledge of a handicap, the employer appears to have known that a particular back injury had affected or was likely to affect the employee's work."

The record in this case does not convince the Appeals Board that respondent knew that claimant's back condition "had affected or was likely to affect the employee's work". The evidence does not establish that claimant was experiencing any difficulty performing his job with respondent. Furthermore, respondent did not even know that claimant had seen a doctor for his back. Therefore, even if the claimant was handicapped, the respondent did not know it. As counsel for the Fund points out, respondent had knowledge that this 62-year-old worker had some backaches which in claimant's own words were just like any other carpenter's backaches. This is not sufficient to carry the respondent's burden of proof with regard to knowledge of handicap.

For the reasons stated and based upon the record as a whole, the Appeals Board finds that respondent has failed to carry its burden of proof with regard to claimant's handicapped

status and with regard to the knowledge requirement. As such, the Award of the Special Administrative Law Judge assessing liability against the Fund should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrisey dated November 15, 1994, should be, and is hereby, reversed as to the order assessing liability against the Kansas Workers Compensation Fund. All other findings, conclusions and orders of the Special Administrative Law Judge are hereby approved and adopted by the Appeals Board to the extent they are not inconsistent with the findings, conclusions and orders enumerated herein.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
James B. Biggs, Topeka, KS
D. Steven Marsh, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director